No. 20380

In the

United States Court of Appeals

For the Ninth Circuit

KATHERINE TASHIRE, EVA SMITH, HARRY SMITH, LILLIAN G. FISHER, BARBARA McGALLIAND, DORIS ROGERS, GAIL R. GREGG, RICHARD L. WALTON, heir of SUE WALTON, and DONALD WOOD,
Appellants,

vs.

STATE FARM FIRE AND CASUALTY COMPANY and GREYHOUND LINES, INC.,
Appellees.

BRIEF FOR APPELLEE GREYHOUND LINES, INC.

Interlocutory Appeal from Order Denying Motion to Dissolve Restraining Order of the United States District Court for the District of Oregon
HONORABLE WILLIAM G. EAST, Judge

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DAILY JOURNAL OF COMMERCE
20

SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES—(Contd.)

OTHER AUTHORITIES

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BRIEF FOR APPELLEE GREYHOUND LINES, INC.

JURISDICTION

This is an action in the nature of interpleader filed on January 22, 1965 by appellee State Farm Life and Casualty Company, an Illinois corporation, seeking (1) a determination of its liability to defend and to extend coverage to the driver of a pickup truck which collided with a Greyhound bus near Redding, California on

September 19, 1964; and (2) an adjudication of defendants' claims against the policy limits of $20,000, which sum was paid into court. Named as defendants were the driver and the owner of the pickup truck, the bus company and its driver, and the 35 bus passengers (and their representatives) who are citizens and residents of Oregon, California, Washington, South Dakota, Montana and Canada. There is diversity of citizenship between plaintiff and all defendants and among the defendants themselves (R 1-3). Jurisdiction was based on 28 USC § 1335 (the interpleader statute) and § 1332 (diversity of citizenship) (R 3).

The complaint alleged that

1. Plaintiff believed there was neither coverage nor any duty to defend, because the pickup truck was being used in the business of its owner, not the insured driver, at the time of the accident;

2. At least four actions totaling $1,110,000 had been filed against the driver in California and others were threatened;

3. Plaintiff was not authorized to admit the driver's liability for the accident;

4. The amount of liability for injuries and deaths in the accident, if established, would exceed the policy limits; and

5. If the court should determine that there was coverage, plaintiff would relinquish its claim to the fund to the extent needed to satisfy defendants' claims (R 1-6).

An order was entered on January 22 requiring defendants to show cause why they should not be restrained from instituting or prosecuting suits in state or federal courts affecting the property or obligation involved in the action, and specifically against plaintiff and its insured (R 13-14). This order was served, together with the summons and complaint, personally in Oregon or by substituted personal service on all of the American defendants except Gladys Hart (R 15-68).[1] The Canadian defendants were served by registered mail (R 69-80).

On May 3, 1965[2] the trial judge, having previously overruled motions and objections of defendants Nauta (the bus driver), Greyhound Lines, Inc., Chisefski and Hollenbeck (none of whom are appellants herein), entered an order restraining defendants (except Gladys Hart) from instituting or prosecuting proceedings in any state or federal court affecting the property or obligation involved in the action and specifically pro-

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1. Service on Gladys Hart (R 190A) and Donald Wood was thereafter perfected.
2. The order of May 3, 1965 was "modified" on July 19, 1965 to permit defendants to file (but not to prosecute) suits. It was entered in response to the motion of appellants Fisher, Rogers, Gregg and Walton filed July 15, 1965, after they had commenced this appeal (R 218).

ceedings against plaintiff or defendants who might constitute its assureds. None of the other defendants opposed entry of the order (R 148, 150).

On May 17 and 21, 1965 the nine defendants who are appellants herein moved for an order dissolving the restraining order and dismissing the action for lack of jurisdiction over the parties (R 178, 182). Those defendants are citizens and residents of Washington (2), Oregon (1), California (1) and Canada (5). The motions were denied on June 1, 1965 (R 195). Interlocutory appeals were taken from that order on June 30, 1965 (R 204, 210). This Court has jurisdiction under 28 USC § 1292.

SUPPLEMENTAL STATEMENT OF THE CASE

The Position of Appellee Greyhound Lines, Inc.

Greyhound is a named defendant in the action and was served with summons and complaint and the order to show cause at Portland, Oregon on January 26, 1965 (R 23). On February 12, 1965 Greyhound moved unsuccessfully for orders dissolving the order to show cause and dismissing the action for lack of jurisdiction (R 90). It did not thereafter oppose the action, nor did it join in the appeal.

Many actions have been commenced against Greyhound in California, Oregon[3] and Washington for in-

3. By way of cross claims in this case (R 130).

juries and deaths arising out of the accident, and more are threatened (R 130-131). It became apparent to Greyhound that this interpleader action, if it can be maintained, provides a convenient and proper proceeding in which to resolve many or all claims arising out of the accident, including claims against Greyhound.

Hallin v. C. A. Pearson, Inc., (DC ND Cal SD 1963) 34 FRD 499 at 501-502

Anno: 17 ALR 2d 741 (1951)

On March 25, 1965 Greyhound filed an answer and cross claim against its co-defendants seeking a determination that it was not responsible for the accident (R 127).

ARGUMENT

Introduction

The American appellants were served with process and the restraining order under 28 USC § 2361, and appellants do not attack the propriety of the order as to them. Their only contention is that it should be reversed and the action dismissed, because the Canadian claimants were not served within the United States.[4]

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4. Appellants do not attack the sufficiency of proof of service on the Canadian claimants, which would not affect its validity in any case. Rule 4(g) FRCP.

1. The critical need for interpleader relief and the restraining order.

The interpleader statute[5] is remedial and is to be liberally construed to prevent multiple litigation and the risk of multiple liability.

New York Life Insurance Company v. Welch, (CA DC 1961) 297 F2d 787 at 790

Builders and Developers Corp. v. Manassas Iron & Steel Co., (DC Md 1962) 208 F Supp 485 at 489

Similarly, Rule 22(1) FRCP[6] provides "the most modern and liberal method of obtaining interpleader to be found" (3 Moore's Federal Practice (2d Ed) 3007 (Par 22.04(1)).

The need for relief in cases involving multiple claims against a limited fund arising out of a single disaster has given substance to these rules. The many bus passen-

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5. 28 USC § 1335 provides:

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, * * * if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, * * *."

6. Rule 22(1) FRCP provides:

"Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. * * *"

gers and Greyhound are, as to the basic questions of coverage and liability, in identical positions. Although their separate claims will vary in amount according to their respective injuries and losses, multiple litigation over these common questions may well produce conflicting decisions which will benefit some and wholly deny relief to others. Furthermore, the insurance policy, assuming both liability and coverage, is obviously insufficient to satisfy all of the claims, and interpleader has the obvious advantages of marshaling its limits and protecting the insurer both from multiple litigation and from the risk of multiple liability. Interpleader relief is proper in such cases, even if the plaintiff is not a wholly disinterested stakeholder, because the alternative to it is the simultaneous prosecution of many widely scattered lawsuits separately contesting the same issues and a race to judgment in which many claimants will be denied any recovery at all. See 70 ALR 2d 416 (1960).

Commercial Union Insurance Co. of New York v. Adams, (DC SD Ind 1964) 231 F Supp 860 at 863, 867:

> "Finally, it has been urged that the action is not proper because the claimants do not have claims adverse to each other. It might, by the same reasoning, be said that 100 persons adrift in the ocean with but one small lifeboat in sight were not adverse to each other. We fear, however, that the concept of non-adversity would dwindle in direct proportion to the number of swimmers reaching the boat. * * *

* * * * *

Two of the prime purposes of the interpleader statute are to avoid multiplicity of actions, and to avoid an inequitable division of a common fund when the fund is insufficient to pay all of the claims against it. Both prospective situations have arisen out of the Coliseum disaster, and both may be minimized in this interpleader proceeding."

Restraining orders are essential to the effectiveness of interpleader relief in major disaster cases, and they are expressly authorized in § 1335 cases under 28 USC § 2361.

Commercial Union Insurance Co. of New York v. Adams, supra, (DC SD Ind 1964) 231 F Supp 860 at 867-868

They are also proper in interpleader cases under Rule 22(1).

Pan American Fire & Casualty Company v. Revere, (DC ED La 1960) 188 F Supp 474 at 485:

"* * * every indication is that, regardless of the Interpleader Act, the power of a federal court to enjoin pending state court proceedings in a case like this one will be sustained. Certainly that result is desirable, if not indispensable. If the court had no power to enjoin concurrent state court proceedings,

the grant of interpleader would often create more problems than it solved."[7]

2. Jurisdiction to proceed with the action and issue the restraining order under 28 USC § 2361.

Section 2361 provides:

> "In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found."

Appellants contend that foreign service[8] is prohibited by § 2361, although the statute does not so state and the courts have said remarkably little about it.

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7. *Revere* was an interpleader action by the insurer of a truck which had collided with a school bus. After an exhaustive review of the cases, Judge Wright sustained jurisdiction under § 1335 and issued an injunction. He also held that restraining orders could issue against state court proceedings in a Rule 22(1) case.

8. By "foreign service," we mean service outside the United States.

See *Kuerschner & Rauchwarenfabrik v. New York Trust Co.*, (DC SD NY 1954) 126 F Supp 684 at 689 (dictum; proceeding under Rule 22(1) FRCP)

Cordner v. Metropolitan Life Insurance Company, (DC SD NY 1964) 234 F Supp 765 at 767 (same)

Aetna Life Ins. Co. v. DuRoure, (DC SD NY 1954) 123 F Supp 736 at 739-740

Agricultural Ins. Co. v. The Lido of Worcester, (DC Mass 1945) 63 F Supp 799 at 801 ("Process may run at least throughout all the states.")

The basis for implying such a limitation seems particularly slender in view of the Judicial Revision Code of 1948, which extended interpleader jurisdiction under § 1335 to controversies involving alien claimants. In *United States v. Cardillo*, (DC WD Pa 1955) 135 F Supp 798, registered mail notice of denaturalization proceedings was sustained in the face of a statute requiring notice by personal service or publication, the Court holding that the statute should be "liberally construed" to require only actual notice to persons outside the United States (which the Canadian appellants already have) and an opportunity to defend (which they also have). The statute should be construed to permit foreign service upon claimants who are outside the United States.

3. Jurisdiction to proceed with the action and issue the restraining order under 28 USC § 1655.

28 USC § 1655 provides:

> "In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.
>
> Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks."

It is asserted that personal jurisdiction is a prerequisite to relief in interpleader cases under Rule 22(1) or § 1335 which seek to adjudicate personal rights. If, however, appellees correctly contend that this is a proceeding *quasi in rem* with respect to the fund deposited in court, it is not necessary that personal jurisdiction be secured over all claimants as a condition to exercising jurisdiction over the fund and protecting it by a restraining order.

a. Section 1655 impliedly authorizes foreign service in interpleader actions involving a *res* brought under Rule 22(1) FRCP based on diversity jurisdiction (pres-

ent in this case)[9] and should equally permit such service in proceedings under § 1335.

Republic of China v. American Exp. Co., (DC SD NY 1951) 95 F Supp 740 at 743-744, aff'd (CA 2 1952) 195 F2d 230, opinion on remand (DC SD NY 1952) 108 F Supp 169

A/S Krediit Pank v. Chase Manhattan Bank, (DC SD NY 1957) 155 F Supp 30, aff'd (CA 2 1962) 303 F2d 648

See also *San Rafael Compania Naviera, S.A. v. American Smelt. & R. Co.*, (CA 9 1964) 327 F2d 581 at 587-588 (proceeding under Interpleader Act)

Although the geographical scope of the District Court's injunctive power in a Rule 22(1) interpleader suit not involving a fund may be limited to the district in which it sits (3 Moore's Federal Practice (2d Ed) 3046 (Par 22.13)), where jurisdiction exists under § 1655 the court may enjoin parties from taking action elsewhere affecting the fund.

All Continent Corporation v. Steelman, (CCA 3 1936) 86 F2d 913 at 915, rev'd on other grounds (1937) 301 US 278

See also *Pan American Fire & Casualty Company v. Revere*, supra, (DC ED La 1960) 188 F Supp 474 at 483-485

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9. See the comments of the Advisory Committee on the Federal Rules concerning the 1963 amendments to Rule 4 (28 USCA pocket part at p 27); Anno: 53 ALR 2d 1164 at 1203-1204 (1957) (foreign service under nonresident motorist statutes).

b. Appellants assert (Br 7-8) that interpleader suits are necessarily actions *in personam* to which § 1655 has no application. On the contrary, the nature of the proceeding depends on the issues. Their contention is based on *New York L. Ins. Co. v. Dunlevy*, (1916) 241 US 518, 36 S Ct 613, 60 L Ed 1140, in which the Supreme Court held that a state court could not determine the right of a nonappearing nonresident claimant to the proceeds of an annuity insurance policy, even though the insurer had deposited the policy proceeds in court and sought to interplead both claimants. See also *Aetna Life Ins. Co. v. DuRoure*, supra, (DC SD NY 1954) 123 F Supp 736 at 739-740.

However, since *Dunlevy* it has repeatedly been held that an indebtedness in the form of a fund is a sufficient *res* to support jurisdiction under § 1655 and that conflicting claims to it—including claims of absent foreigners—can be determined in interpleader proceedings.

Republic of China v. American Exp. Co., supra, (DC SD NY 1951) 95 F Supp 740 at 743-744 (claims to bank account)

A/S Krediit Pank v. Chase Manhattan Bank, supra, (DC SD NY 1957) 155 F Supp 30

Anno: 30 ALR 2d 208 at 251 et seq (1953)

In even broader terms, a simple contract claim (without any fund) was held to be within a state court's *quasi in rem* jurisdiction in *Atkinson v. Superior Court*, (1957) 49 Cal 2d 338, 316 P2d 960, app dism'd (1958) 357 US 569, which rejected jurisdictional objections based on *Dunlevy*. *Atkinson* was an action by local employees against their local employers and a nonresident trustee for a determination that a collective bargaining agreement was invalid and that sums payable under it to the trustee were actually wages owing to the local claimants. California law forbids judgments on "personal" claims against nonappearing nonresidents (§ 417 CCP). Justice Traynor stated the question as being

> "* * * whether the chose in action in question may be treated as being within this state within the meaning of section 412 for purposes of exercising in rem or quasi in rem jurisdiction over it in these actions."

After a thorough review of the cases, the court sustained the trial court's *quasi in rem* jurisdiction.

4. Jurisdiction over the Canadian claimants was obtained under and in the manner set forth in Rule 4 FRCP, which provides an additional manner of service upon nonresident claimants and extends such service to all cases in which nonresident service is authorized by state or federal law.

As amended, Rule 4(e) provides:

"*Same: Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. * * *"

As amended, Rule 4(i) provides:

"*Alternative Provisions for Service in a Foreign Country.*

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: * * * (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; * * *"

These amendments provide, in the case of foreign service, an alternative mode of service to that provided in § 2361 and § 1655. *Hoffman Motors Corporation v. Alfa Romeo,* (DC SD NY 1965) 244 F Supp 70 at 77-81.

It is by force of the rule itself that this additional mode of service is effective. But the rule does more than that. It expands the cases in which foreign service is proper to any case in which state or federal law permits service outside the district. Constitutional objections to such reference to state law have been rejected.

> "The amended Rules 4(e) and 4(f) do not contravene the Enabling Act (28 U.S.C. § 2072), which forbids the Supreme Court to prescribe rules which 'abridge, enlarge or modify any substantive right,' for the right affected is not a 'substantive right' within the meaning of that statute. Nor are the rules in conflict with Rule 82 which states that the Rules of Civil Procedure 'shall not be construed to extend or limit the jurisdiction of the United States district courts' for 'jurisdiction' as used in Rule 82 refers only to jurisdiction over the subject matter, not to jurisdiction over the person. * * *" *United States v. Montreal Trust Company*, (DC SD NY 1964) 35 FRD 216 at 219

Rule 4(i) should similarly be construed, according to its terms, to permit foreign service in all cases where a federal statute permits service beyond the district, and to provide for foreign service by registered mail in all such cases, a construction equally applicable to § 2361 and to § 1655.[10]

Rule 4 also supports foreign service by registered

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10. The restraining order in this case bars only suits in domestic courts and has no application to proceedings elsewhere.

mail in this case, because Oregon law permits out-of-state service without territorial limitation in *quasi in rem* cases (ORS 15.110, 15.130).[11] Rule 4(i) provides the alternative manner of such service which was utilized in the trial court. 2 Moore's Federal Practice (2d Ed) 1249, fn 11 (Par 4.34(2)).

5. The action should not be dismissed.

Any defect in the manner or proof of service would in any case not justify reversal of the order or dismissal of the action, but would require merely that service be perfected. No procedural defect has been suggested on this appeal.

Davis v. Gahan, (DC SD NY 1964) 227 F Supp 867 at 872

Even if the court should determine that the trial court lacked interpleader jurisdiction over the Canadian claimants, it would not follow that the action should or could be dismissed. It should in any event proceed as a diversity suit to settle the rights of those who have become parties to it, either through personal service within the district or voluntarily following service elsewhere.

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11. See cases cited in Advisory Committee comments on 1963 amendments to Rule 4, supra, n 9.

CONCLUSION

The need for interpleader relief in this case is critical and is consistent with judicial and public policy. Such relief would be ineffective in the absence of the order which is the subject of this appeal.

The judgment of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney.